

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 16-13151-mkv

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5 In the Matter of:

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7 K&H RESTAURANT, INC.,

8 Debtor.

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11 U.S. Bankruptcy Court

12 One Bowling Green

13 New York, NY 10004

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15 April 26, 2017

16 11:11 AM

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21 B E F O R E :

22 HON MARY KAY VYSKOCIL

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: UNKNOWN

1 Hearing re: Motion Filed by the Debtor for an Order
2 Authorizing and Ratifying Payment of Prepetition, Accrued
3 Employee Wages, Related Payroll Taxes and Related
4 Obligations Nunc Pro Tunc from November 13, 2016

5
6 Hearing re: Motion Filed by the Debtor for an Order
7 Establishing Procedures for Interim Compensation and
8 Reimbursement of Expenses of Professionals
9 Objection Filed by Diamondrock NY Lex Owner LLC

10
11 Hearing re: Application Filed by Andrew R. Gottesman, as
12 Debtor's Attorney, for Allowance of Compensation and
13 Reimbursement of Expenses
14 Objection Filed by Diamondrock NY Lex Owner LLC

15
16 Hearing re: Application Filed by Davis & Gilbert LLP, as
17 Special Litigation Counsel for Debtor and Debtor in
18 Possession, for Allowance of Compensation
19 Objection Filed by Diamondrock NY Lex Owner LLC

20
21 Hearing re: Motion Filed by Andres Martinez, Myroslava
22 Velychko, Eman Abdelkarim and Noedith Rojas for Relief from
23 the Automatic Stay
24 Objection Filed by the Debtor

25

Hearing re: Motion Filed by the Debtor to Extend
Exclusivity Period for Filing a Chapter 11 Plan and to
Solicit Acceptances Thereto
Objection Filed by Diamondrock NY Lex Owner LLC

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

THE COURT: All right. Case Number 16-13151, K&H Restaurant, Inc.

(Pause)

THE COURT: All right. Good morning. Could I have appearances, please?

MR. GOTTESMAN: Good morning, Your Honor. Andrew Gottesman for the debtor.

MR. SNYDER: Your Honor, good morning. Eric Snyder, Wilk Auslander, for Diamondrock, the landlord.

THE COURT: Good morning.

MR. VELEZ-RIVERA: Andrew Velez-Rivera for the U.S. trustee.

THE COURT: Good morning.

MR. CAFARO: Good morning, Your Honor. Bill Cafaro for the creditor/movant on the motion for stay.

THE COURT: All right. And I'm sorry. Your last name?

MR. CAFARO: Cafaro, C-a F as in Francis A-r-o.

THE COURT: And your firm?

MR. CAFARO: Law Offices of William Cafaro.

THE COURT: Okay. Thank you. All right. Have a seat everybody for one moment.

All right. We have on the calendar today a number of matters. I think we have six different matters. Some of

1 them I think can be grouped together, but why don't we start
2 with the debtor's motion for an order authorizing and
3 ratifying payment of prepetition wages.

4 MR. GOTTESMAN: Well, certainly, Your Honor.
5 That's a fine place to start, but I would like to let you
6 know that last night we agreed to adjourn the three
7 compensation-based motions with the landlord and the U.S.
8 trustee who objected to those motions. So there was a
9 motion on for -- there's two applications for -- the first
10 application's for interim compensation and reimbursement of
11 expenses for my firm and for special counsel.

12 THE COURT: For Davis & Gilbert?

13 MR. GOTTESMAN: Correct.

14 THE COURT: And then --

15 MR. GOTTESMAN: And an interim compensation
16 procedures motion.

17 THE COURT: The procedures motion's adjourned as
18 well?

19 MR. GOTTESMAN: Yes, ma'am.

20 THE COURT: All right. Have you bothered to
21 notify chambers of that --

22 MR. GOTTESMAN: We just --

23 THE COURT: -- and get an adjourn date?

24 MR. GOTTESMAN: We just had that agreement last
25 night, and so I was going to notify chambers and get an

1 adjourn date today.

2 THE COURT: Okay. All right. So please do that
3 when we recess this morning, all right.

4 MR. GOTTESMAN: Absolutely.

5 THE COURT: All right. So as I said, let's start
6 with the employee wage motion. And the first question I had
7 which screams out off of the page is that there has been a
8 post-petition payment apparently.

9 MR. GOTTESMAN: That is true, Your Honor. There
10 was a post-petition payment that was made in November. The
11 post-petition was made, the payment was made inadvertently
12 by my client in the effort to make sure their workers got
13 paid and stayed on the job.

14 THE COURT: All right. Does your client now
15 understand that having filed for bankruptcy protection your
16 client is not permitted to make payments and to go about
17 business as usual without -- in terms of making payments or
18 spending assets -- without coming to the Court?

19 MR. GOTTESMAN: Yes, Your Honor. I've made that
20 very clear to him.

21 THE COURT: All right. So go ahead and, you know,
22 make your record with respect to your motion.

23 MR. GOTTEMAN: Your Honor, the debtors, I would
24 say, inadvertently made a payment on November 20th to
25 certain of their workers basically paying payroll. Payroll

1 is usually -- is paid always at least one week and
2 potentially more in arrears. So the payment that was made
3 to these particular people, there was an \$11,000 payment.
4 \$7,491 of that was wages. 4,289 of that was -- excuse me --
5 was payroll taxes. That was to pay for the week. The pay
6 compensated those particular workers for the week prior to
7 the filing of the bankruptcy case.

8 So the request in the motion or the relief that is
9 requested is under 363(b) to be able to use or to ratify
10 those payments retroactively and to seek authority under
11 363(b) for those payments.

12 THE COURT: Which should have been done as a
13 first-day motion.

14 MR. GOTTESMAN: Absolutely.

15 THE COURT: Does anybody wish to be heard with
16 respect to the motion? Anything from the U.S. trustee?

17 MR. VELEZ-RIVERA: We have no objection, Your
18 Honor.

19 THE COURT: All right. No objections have been
20 filed to the motion. As I said, I admonish you and your
21 client in the strongest terms that you need to be attentive
22 to limitations on what the debtor is permitted to do now
23 that it has filed for bankruptcy protection in this Court.
24 But with that admonition, the motion will be granted.

25 MR. GOTTESMAN: Thank you, Your Honor.

1 THE COURT: All right. So the next motion that I
2 had on is the interim compensation procedures. You're
3 saying that one's adjourned along with the various fee
4 applications, right?

5 MR. GOTTESMAN: Yes, ma'am.

6 THE COURT: All right. So that -- in terms of the
7 debtor's motions, let's finish those off. There's the
8 motion by the debtor for relief from the -- I'm sorry -- to
9 extend your exclusivity period. So why don't we take that
10 motion now.

11 MR. GOTTESMAN: That's correct, Your Honor. The
12 debtors are seeking relief under Section 1121(d) to extend
13 the exclusivity period for 120 days. The 120 days would
14 put us out to -- I'm sorry -- the current exclusivity period
15 expire on March 13th. We made the motion prior to March
16 13th, and under the local rules, we get an automatic
17 extension until the motion can be heard.

18 The requested extension is for 120 days, which
19 would take us out to July 11th.

20 THE COURT: Right.

21 MR. GOTTESMAN: The debtors submit both in their
22 papers and in the reply to the landlord's objection that the
23 nine factors that are generally considered with respect to
24 exclusivity are all satisfied both in the record and by the
25 declaration of (indiscernible) who is the principal and

1 owner of the debtor.

2 But the Court is permitted to take into
3 consideration other evidence and other -- I mean, excuse me
4 -- other factors outside of those nine factors. And I think
5 the one that is or I believe the one that is the most
6 salient is the fact that this extension would put out the
7 exclusivity dates only one month after the time when the
8 debtor has to have their lease either assumed or rejected.
9 Like they don't have to assume or reject as extended by this
10 Court on May -- on March 8th to June 11th. So this gives us
11 one month after that happens to file a plan.

12 Clearly, as I'm sure Your Honor is aware and by
13 reading the papers can clearly see that the lease is the key
14 issue in this case. And without the lease, there is nothing
15 to base a plan around. So we would say that that is a
16 salient factor in establishing cause under 3 -- under
17 1121(d) for the extension of the exclusive periods.

18 As a practical matter, the other factors that are
19 considered under the what we have termed the Adelpia
20 factors --

21 THE COURT: Right.

22 MR. GOTTESMAN: -- are all applicable in this
23 case. You know, the case, while it's a small case, is
24 somewhat more complex than other small cases in that there
25 is a lease that not only is subject to an objection from the

1 landlord and a great deal of litigation thereon, but also
2 subject to a collective bargaining agreement.

3 The collective bargaining agreement alone sets out
4 three different classes of hotels, four classifications of
5 workers, different pay terms, termination terms, hours,
6 vacation time for all of those workers. And in a
7 restaurant, workers change relatively frequently, so there
8 is a bit of complexity to the issues and not only how the
9 restaurant runs but how well those sorts of things fit
10 together.

11 The debtors are paying all of their liquidated
12 noncontingent post-debt -- post-petition debts as they come,
13 too.

14 THE COURT: Right. There seems to be some dispute
15 about that.

16 MR. GOTTESMAN: Yes, I understand that. As I said
17 in my reply to the landlord's objection, I noted that there
18 is a still a disputed amount that is owed to the union. The
19 union, we have been in contact with the union and we're
20 trying to reconcile that amount. For their own reasons, the
21 union sent a letter to Highgate, which is not the landlord.
22 Highgate is the management company. They sent the letter to
23 Highgate demanding payment of a specific amount.

24 Since that letter, the union has -- I've been in
25 contact with the union, the union's counsel personally, and

1 the union's counsel has requested information which they
2 have gotten but information in order to allow them to ask to
3 be able to reconcile the amount that the restaurant actually
4 owns. So I don't know where the number in that April 11th
5 letter came from, but I don't also have a particular
6 understanding of how it can be accurate if they're
7 continuing to request information to ascertain that number.

8 THE COURT: Right. But the landlord has paid some
9 portion?

10 MR. GOTTESMAN: The landlord paid a pre-petition
11 amount, and the pre-petition amount was for an arbitration
12 that happened in May -- I want to say in March of 2015.

13 THE COURT: Okay.

14 MR. GOTTESMAN: But they have not paid any portion
15 of the post-petition amount and so none of that is owing
16 under the lease to the landlord. The debtor does not
17 dispute that they owe amounts to the union for continued
18 operations post-petition, but they do not know what that
19 amount exactly is and are working diligently with the union
20 to figure out what the amount is and have assured me that
21 once that amount is ascertained, that that will get paid
22 immediately.

23 THE COURT: Okay. All right. Does the landlord
24 wish to be heard?

25 MR. SNYDER: Oh, yeah. Thank you, Judge.

1 Your Honor, as Mr. Gottesman alluded --

2 THE COURT: You want to just state your appearance
3 for the record, please?

4 MR. SNYDER: I'm sorry. Eric Snyder, Wilk
5 Auslander, for the landlord.

6 THE COURT: Right. Now before we walk into the
7 discussion on the motion to sell, I just want to be clear
8 that I understand what you did here. You basically filed an
9 objection to this motion, right?

10 MR. SNYDER: Correct, Your Honor.

11 THE COURT: And two other motions and that's ECF
12 number 67. And then you filed in effect a surreply.

13 MR. SNYDER: Correct, Your Honor, because when we
14 became aware of the letter on April 11th, the hearing was
15 scheduled for the next day.

16 THE COURT: All right. But when --

17 MR. SNYDER: We didn't want to surprise the Court
18 with it, so we wanted to put Mr. Gottesman as well as the
19 Court on notice that we were getting dunned again for
20 additional sums. And then I thought it was a good fortune
21 that the hearing was adjourned so that the Court would have
22 an opportunity to read it and Mr. Gottesman would have an
23 opportunity to respond.

24 THE COURT: All right. Well, I'm putting you on
25 notice unauthorized surreplies are not acceptable to the

1 Court. If there are developments that happen after a matter
2 is fully briefed and before it comes on for a hearing,
3 there's a mechanism for a very brief one-line letter saying,
4 you know, the attached is a subsequent development relevant
5 to the motion or the attached is a case that came down but
6 not a lot of briefing and commentary.

7 So going forward, the schedule for briefing will
8 be enforced by the Court.

9 MR. SNYDER: I apologize, Your Honor.

10 THE COURT: All right.

11 All right. So thank you. Please talk to me
12 though about where's the downside and the harm to the
13 landlord here in extending the exclusivity period? Is it
14 not in everybody's interest in having some kind of feasible
15 plan put forward?

16 MR. SNYDER: Well, Your Honor, with respect to the
17 landlord being not only the largest unsecured creditor but I
18 believe now the largest contingent administrative creditor,
19 would obviously, Your Honor, like the lease rejected, would
20 like to make a distribution to creditors, would like to take
21 over the space.

22 I would point out, Your Honor, that I received an
23 e-mail from Mr. Gottesman yesterday evening as he suggested
24 putting off the hearing on the fee issues. And one of the
25 reasons stated is because a secured creditor had not planned

1 to consent and that the debtor has been using cash
2 collateral for six months without the use of consent of a
3 secured creditor. So I went on to the Division of
4 Corporations website and saw there are four secured
5 creditors with blanket securities.

6 So when the Court talks about post-petition
7 payments and pre-petition amounts, we now have the use of
8 cash collateral without an agreement and we have
9 administrative expenses, Your Honor. It's the same amount,
10 Your Honor, as it was pre-petition, approximately 15,000 a
11 month due to the landlord or due to the union on account of
12 wage obligations. So that amount, Your Honor, since
13 November 6, the petition date is six months at 15,000 a
14 month is \$90,000.

15 Now it may be \$80,000 and it may be \$100,000, but
16 there was already an arbitration for \$15,000. So the debtor
17 is using cash collateral without consent, the debtor is
18 accruing post-petition administrative expenses, and is not
19 paying them.

20 And I appreciate, Your Honor, that Mr. Gottesman
21 is working with the union at the end of April, but this case
22 has been in front of Your Honor for six months. So it's a
23 bad pun, Your Honor, but there's no plan here. There's no
24 plan to come out of bankruptcy, but it's really business as
25 usual. And the news I give the Court is just more bad news.

1 The last thing that's happened since last hearing,
2 Your Honor, and I will --

3 THE COURT: Thank you. But let me --

4 MR. SNYDER: I'm sorry.

5 THE COURT: -- interrupt you and ask you to back
6 up. What -- I'm not following exactly what has been paid
7 with cash collateral without authorization from the Court.
8 And if there is something --

9 MR. SNYDER: Everything.

10 THE COURT: -- that's a --

11 MR. SNYDER: The debtor's been operating for six
12 months.

13 THE COURT: But not paying the landlord are you
14 telling me?

15 MR. SNYDER: Not been paying the landlord these
16 amounts or not been paying the union these amounts. We've
17 gotten our base rent, yes, Your Honor.

18 THE COURT: Not paying the arbitration award
19 amounts?

20 MR. SNYDER: The arbitration aware, Your Honor, is
21 all pre-petition.

22 THE COURT: Yeah.

23 MR. SNYDER: The amount post-petition, Your Honor,
24 is the letter we got from the union saying, surprise,
25 surprise, you have to pay us another 169 for 11 months, the

1 11 months being from May 2016 to March 2017. November,
2 December, January, February, March is assessment by the
3 union against the debtor which we're on the hook for for
4 five months.

5 THE COURT: Right. But he's telling you he's
6 working with the union on this.

7 MR. SNYDER: I understand, Your Honor. This case
8 has been in bankruptcy five months. Those amounts aren't
9 paid, and my client is inclined to pay them because they
10 want to have good relationships with the union. So while
11 the debtor is doing whatever the debtor is doing, we are
12 being put on the hook for post-petition administrative
13 expenses that are not being paid.

14 And if you want to know what's in the landlord's
15 best interest, Your Honor, and I'll be frank, it's to get
16 this tenant out. I understand --

17 THE COURT: Well, I understand that's your
18 objection, but --

19 MR. SNYDER: I understand, Your Honor, but if we
20 propose a plan, the plan will pay something. I don't know
21 what the Debtor's plan is, but the cure on this is now
22 exceeding \$300,000.

23 And the last point, Your Honor, about what's going
24 on with the lease, yes, the lease is the issue. My
25 understanding is though that counsel went into state court

1 earlier this month and told the judge that there's --

2 THE COURT: Counsel for the debtor?

3 MR. SNYDER: Correct, Your Honor. Special counsel
4 I'm told. The judge in state court that that court can't
5 determine the issue of whether the lease terminated pre-
6 petition because they had made a motion to enforce the stay
7 which means, Your Honor --

8 THE COURT: Well, there is a stay.

9 MR. SNYDER: Your Honor, we would suggest there is
10 no stay, and the debt has been operating in state court for
11 six months. But, Your Honor, someone has to decide that
12 issue. And what I said to Mr. Gottesman the day after this
13 hearing six weeks ago I think is we need to tee up that
14 issue because the 210th day, Your Honor, under 365(d)(4)
15 expires in 47 days. It expires -- today is April 25th. It
16 expires on June 10th.

17 So what I told Mr. Gottesman is make the motion
18 now to do whatever you need to do with the lease because I
19 don't want to be here on June 10th with a request that that
20 day be extended. Obviously with everything that's going on,
21 Your Honor, the landlord is unwilling to extend that date.
22 So we were told there's evidence that the lease didn't
23 terminate pre-petition. I would love to see it. But that
24 motion has not been made. I don't --

25 THE COURT: And that motion's not before me, so.

1 MR. SNYDER: I understand, Your Honor, but we're
2 talking about the reasons why exclusivity shouldn't be
3 extended. Those are the reasons because the motion to deal
4 with that issue has not been made here. The state court has
5 been frozen because they're not going to move against a
6 counsel saying that the stay is in effect. These issues
7 about use of cash collateral and post-petition wages and
8 unpaid administrative expenses is the reason the cause
9 doesn't exist when the debtor has not met its burden of
10 extending exclusivity. And that's why we objected.

11 And I don't consider these to be inconsequential
12 things. I don't normally in small cases object to
13 exclusivity, but these are real. I have nothing --

14 THE COURT: Anything else?

15 MR. SNYDER: -- further, Your Honor.

16 THE COURT: All right. Sure. I mean what do you
17 have to say to these issues? I mean these are serious
18 concerns.

19 MR. GOTTESMAN: I don't deny that they are serious
20 concerns, but I would say a couple of things. One, the
21 landlord's entire purpose here is to have the lease rejected
22 to have the lease terminated and get my clients out.

23 THE COURT: He just said that.

24 MR. GOTTESMAN: Right. So anything that is --
25 anything they said is only geared toward that purpose. And

1 filing a plan -- that's the only purpose in wanting to file
2 a plan here is to push that purpose forward and to put
3 pressure on the debtor in order so the debtor capitulates to
4 get out of this phase. That's it and that's all.

5 But I will say that the administrative -- first of
6 all, the landlord is not an administrative creditor at this
7 point. The landlord is being paid in full. The only
8 administrative creditor at this point is the union. And the
9 numbers that the landlord is using, \$15,000 a month, have
10 not been proven, have not been trued up. They're based on a
11 past amount that has just averaged over time.

12 We have no idea whether that amount is front
13 loaded, whether the amount that the union in a letter which
14 I said, Your Honor, kind of has no basis with respect to the
15 actual number in the letter, but the number hasn't been
16 proven. The amount owed to the union has not been
17 reconciled. We don't know if the amount that the --

18 THE COURT: Right. I understand that point.

19 MR. GOTTESMAN: And the \$170,000 in that letter
20 accounts for times most of that is pre-petition. It's not
21 post-petition.

22 THE COURT: I understand all that, but the
23 landlord does have a legitimate concern that it is getting
24 Dunning letters in effect I'm going to call them from the
25 union and that it has a joint and several obligation and is

1 concerned about maintaining good relations with the union.

2 And you are prejudicing that interest.

3 MR. GOTTESMAN: We're prejudicing that interest
4 only to the point that the union makes it an issue with the
5 landlord. First of all, the union sent a letter to not the
6 landlord, to the management company. I realize that they
7 are -- they're not related companies, but they're two
8 different companies. If the landlord wants to pay the union
9 and bring a motion for stay relief, they're free to do that.
10 And if that's how they want to tee all this up, they can do
11 it. But ultimately, the amount that the debtor owes the
12 union is still in question.

13 And as I said, the debtor is fully prepared and
14 fully able to pay the union what they're owed as soon as we
15 understand what they're owed and they continue to ask us for
16 information. I've now given them all the information they
17 want. I've given them payroll records, termination dates,
18 hire dates --

19 THE COURT: Right.

20 MR. GOTTESMAN: -- the kinds of things that they
21 need to --

22 THE COURT: But the payment to the union isn't the
23 only issue. What about this, you know, comment by the
24 landlord that you are basically operating your business and
25 using cash collateral without any authorization from the

1 Court?

2 MR. GOTTESMAN: Your Honor, that is an issue with
3 at least -- there's one secured creditor that I'm already
4 talking to.

5 THE COURT: That's a serious issue.

6 MR. GOTTESMAN: I could not agree more. It is a
7 serious issue.

8 THE COURT: I mean are you telling me that that
9 is, in fact, happening?

10 MR. GOTTESMAN: The first I heard about it was
11 today. And the first I heard about it was from the landlord
12 who clearly has an agenda, so whether it's true or it's not
13 true --

14 THE COURT: His agenda is that if you file for
15 bankruptcy protection, you have to follow the rules.

16 MR. GOTTESMAN: Yes. I --

17 THE COURT: I just discussed that with you in
18 connection with your first motion that's on for today.

19 MR. GOTTESMAN: I understand that, but I had no
20 knowledge that there were other secured creditors such that
21 there would be other -- that there would be cash collateral
22 that is being used. And I will reach out to all of those
23 creditors today and get either their consent or bring a
24 motion immediately for the Court to approve the use of cash
25 collateral or not the use of collateral.

1 THE COURT: Counsel, I mean, look, in the normal
2 course, those are the kinds of motions you're supposed to
3 bring at the outset of the case, right?

4 MR. GOTTESMAN: Your Honor, I --

5 THE COURT: I mean this is not a brand new case.

6 MR. GOTTESMAN: I couldn't agree more, but I did
7 not bring this case.

8 THE COURT: I understand that, and the fact that
9 you're relatively new I'm going to call it to the case is a
10 factor that the Court is considering in connection with your
11 request for more time. But the more I'm learning about what
12 has gone on and what apparently continues to go on frankly
13 is troubling to me.

14 MR. GOTTESMAN: And I don't disagree and frankly,
15 it's trouble to me to continue to put out fires as they
16 arise. However, I think that we had to have at least been
17 diligent in putting out those fires or at least -- and in
18 finding them. I mean truthfully, I need to make sure that
19 these are actually secured creditors and do some homework
20 and understand that. And to the extent that they are, we
21 will deal with that in the fastest way possible, either et a
22 stipulation from them to use -- continue to use cash
23 collateral or bring a motion to ask Your Honor for the
24 approval to use cash collateral.

25 THE COURT: Right. But I mean in all candor, you

1 haven't really been acting with dispatch here. I mean what
2 about counsel's suggestion that he talk to you about the
3 fact that, you know, there's no plan, not a capital P, no
4 game plan, no discussion's gone on with respect to the lease
5 issue and tell me --

6 MR. GOTTESMAN: Your Honor, I think that is not
7 true that there has not been discussions that have gone on
8 with respect to the lease. In fact, most recently there
9 have been discussions that have gone on with respect to how
10 we can reconcile with the landlord and do something that is
11 in both -- in everybody's interest and settle all of the
12 disputes with the landlord.

13 THE COURT: And your date to assume or reject the
14 lease is June 10th?

15 MR. GOTTESMAN: Correct. So we have to make a
16 motion in the next two weeks.

17 THE COURT: All right. Anything else from
18 anybody? Anything from the U.S. trustee?

19 MR. VELEZ-RIVERA: No, Your Honor.

20 THE COURT: All right. So the Court has listened
21 to argument of counsel and carefully reviewed your papers.
22 I'm very troubled frankly by some of what I've learned
23 during the course of argument here.

24 My strong inclination is to afford counsel an
25 opportunity to try to make progress towards bringing its

1 case to a successful point where a plan can be proposed and
2 confirmed, but the evidence that I heard today frankly is
3 troubling to me. I still conclude that weighing the
4 Adelpia factors, there is cause or some extension of the
5 exclusivity period here, but I'm not prepared to give you
6 120 days given the course of conduct that's been going on
7 here.

8 So the motion will be granted only to the extent
9 of a 60-day extension which takes you then to shortly after
10 the deadline for dealing with the lease on June 10th. So
11 sometime in June we're going to have a sense of what's
12 happening here and where you're going with all of this.

13 MR. GOTTESMAN: Yes, Your Honor, and --

14 THE COURT: So please submit a revised order in
15 Word format.

16 MR. GOTTESMAN: I will do that. But just to
17 clarify, there's not -- that does not prejudice in any way a
18 further request for an extension at that time?

19 THE COURT: You have whatever rights you have
20 under the Code.

21 MR. GOTTESMAN: Thank you.

22 THE COURT: Bear in mind the admonition and the
23 dissatisfaction that I've expressed with respect to the
24 conduct of the debtor. And that certainly will bear on any
25 further requests to the extent one is even authorized.

1 MR. GOTTESMAN: (Indiscernible), Your Honor.

2 THE COURT: All right.

3 All right. So that brings us then to the motion
4 by certain employees -- I'm going to call them to shorthand
5 it -- for relief from the automatic stay. So if you'll
6 just give me one moment to shift my own files. Excuse me.

7 (Pause)

8 THE COURT: All right. Good morning, counsel.

9 MR. CAFARO: Good morning, Your Honor.

10 THE COURT: You may proceed.

11 MR. CAFARO: Thank you.

12 THE COURT: Do you want to just state your
13 appearance for the record?

14 MR. CAFARO: Yes. Bill Cafaro for the employees,
15 employee creditors who are seeking relief from the automatic
16 stay. The corporate debtor has been stealing the tips from
17 his employees for years. There was a prior wage case in
18 which I've cited in my papers which had identical
19 allegations brought by six of the employees --

20 THE COURT: And any of them the same?

21 MR. CAFARO: I'm sorry.

22 THE COURT: Any overlap among the -- is it the
23 same --

24 MR. CAFARO: No.

25 THE COURT: -- six?

1 MR. CAFARO: No.

2 THE COURT: Okay.

3 MR. CAFARO: It was six different employees. I
4 have four. But the allegation I'm referring to is that the
5 employees are to this day they are outright refused when
6 they ask to see how the tips are being distributed. This is
7 money that the debtor is taking in as a fiduciary and he has
8 never that I can find in all the years ever shown the
9 printout to the employees to show how the tipped item in
10 their paycheck is calculated. I've never seen this in any
11 restaurant before ever.

12 When the previous employees were told -- they'd
13 like to see it. They were told by management, "If you don't
14 like it, you can work somewhere else."

15 THE COURT: Remind me where that prior case was
16 and what the outcome was?

17 MR. CAFARO: It was settled for \$150,000. And I
18 can -- the index number is in the papers, and if I'm not
19 mistaken, it was appended to my papers. If you'll give me
20 one moment, I'll get it for you.

21 (Pause)

22 THE COURT: Was this case originally in front of
23 Judge Castel?

24 MR. CAFARO: It was, but we stipulated to the
25 magistrate who is Judge Moses.

1 THE COURT: Judge Moses, right. And what --

2 MR. CAFARO: The --

3 THE COURT: -- what is the status of that case
4 before the filing?

5 MR. CAFARO: Before the filing, actually no
6 progress was made toward the beginning of the case because
7 the defendant kept playing musical orders and every time I
8 tried to contact the lawyers to get discovery, I was told
9 that he couldn't get a hold of his client. The previous
10 attorney moved to withdraw, which was granted, and new
11 counsel has come in who is representing Mr. (indiscernible),
12 the sole principal, since November who has not filed a
13 Chapter 7 himself. So the case is proceeding against him in
14 the federal court regardless. There are --

15 THE COURT: So have you moved in front of Judge
16 Moses for discovery from him?

17 MR. CAFARO: Yes. And the first thing I need is
18 the merchant account because I want to see how much has been
19 taken from the credit cards. His counsel gave me -- just a
20 couple of weeks ago gave me the merchant account number,
21 said it was the Bank of America. I sent a subpoena to the
22 Bank of America. It came back the other day saying that,
23 hey, I have no information of any such merchant account.

24 THE COURT: Right. But that's an issue for you to
25 take up with Judge Moses, right?

1 MR. CAFARO: Yes, it is.

2 THE COURT: Okay.

3 MR. CAFARO: Yes, it is.

4 THE COURT: And you're a counsel in that case as
5 well?

6 MR. CAFARO: Oh, yes, I am.

7 THE COURT: Okay.

8 MR. CAFARO: Yes I am. The case that Your Honor
9 had asked about is Mendez is the first name, plaintiff, and
10 the docket, the Southern District Docket, is 15CV1947.

11 THE COURT: Okay. Thank you.

12 MR. CAFARO: For example though, if I were to ask,
13 I don't think Judge Moses has the power to direct management
14 in the restaurant to show a printout of how the credit card
15 tips are being calculated because there is a stay in effect
16 with respect to the restaurant. I would have to come here
17 and ask Your Honor that. This Court is frankly foreign to
18 me, and I really don't know what I'm doing here.

19 This is an argument between a landlord and the
20 restaurant, both who have the wherewithal to retain
21 bankruptcy counsel. There are not any bankruptcy counsel
22 who will prosecute the case on a contingency. I had to pay
23 bankruptcy counsel out of my own pocket to get enough
24 guidance to get this before Your Honor in more or less a
25 correct fashion.

1 THE COURT: Mm hmm.

2 MR. CAFARO: This is an argument between the
3 landlord and the debtor. And I am trying to recover money
4 that the debtor has stolen from these four kids that aren't
5 30 years old yet. And I don't think they should be deprived
6 of their right to a jury trial by the virtue of the
7 bankruptcy filing. I acknowledge that he hasn't filed a
8 petition in bad faith, but what he's continuing to do is not
9 only in bad faith. It's outright theft. I --

10 THE COURT: All right. But, counsel, I mean I
11 hear what you're saying and your clients aren't going to be
12 deprived of their right to a jury trial. They just have to
13 wait. All right. I mean so a stay means everything's put
14 on hold, and then that means you as the movant have the
15 burden to come in here and under the Code provisions to make
16 a showing of cause to lift the stay. So under what sections
17 of the Code are you moving?

18 MR. CAFARO: Well, frankly, Your Honor, I'm not
19 that familiar with the Bankruptcy Code and --

20 THE COURT: I mean the problem that you have is as
21 the movant, you have the burden of proof. I hear what
22 you're saying, and I'm sympathetic to what you're saying,
23 but you have not as best I can tell made out cause under the
24 relevant Code provisions to lift the stay, particularly when
25 I -- I mean you can show cause.

1 That is one of the grounds and then there are a
2 number of factors that I'm supposed to consider, but it
3 doesn't appear to me that your papers make out the statutory
4 grounds for relief at this time, particularly given there is
5 a strong policy that when the movant is an unsecured
6 creditor, which is what your clients are, stay relief ought
7 to be granted more sparingly.

8 MR. CAFARO: Well, Your Honor, if Your Honor's
9 inclined to deny it, I'm going to have to begin proceeding
10 before this Court to ask -- to compel the discovery I'm
11 talking about because I just can't stand idly by and watch
12 the debtor continue to steal from my clients as each day is
13 passing by.

14 THE COURT: All right.

15 MR. CAFARO: And that to me egregious injustice.

16 THE COURT: All right. Counsel, on your papers --
17 did you want to consult with -- go ahead.

18 MR. CAFARO: No, Your Honor.

19 THE COURT: It's --

20 MR. CAFARO: Well, I --

21 THE COURT: -- it's fine --

22 MR. CAFARO: I did ask --

23 THE COURT: -- if you wish to --

24 MR. CAFARO: I did ask I believe that the stay be
25 lifted without -- I haven't asked to be able to execute any

1 judgment. I'm asking that the stay be lifted so I can
2 conduct discovery in the Bankruptcy Court so I won't have to
3 burden Your Honor with it as well.

4 THE COURT: You're asking for the limited purpose
5 of conducting discovery?

6 MR. CAFARO: Yes, I am.

7 THE COURT: All right. Look, that isn't really
8 what your motion is.

9 MR. CAFARO: I know.

10 THE COURT: So your motion is denied without
11 prejudice. All right. It is without prejudice. I'm
12 weighing the (indiscernible) factors. I don't find that
13 you've made cause on the present showing. You can proceed
14 in your action against the principal. As you've pointed
15 out, he's not a debtor in bankruptcy so there is no stay
16 with respect to the principal. And you can certainly
17 proceed there and ask for Judge Moses' help in getting
18 whatever discovery you can properly get from the principal
19 and you can bring on an application for further relief at an
20 appropriate time or with a further showing or modified
21 relief from what you asked for.

22 MR. CAFARO: Understood.

23 THE COURT: Okay.

24 MR. CAFARO: Thank you.

25 THE COURT: All right. So counsel for the debtor,

1 please submit an order in Word format to that effect.

2 MR. GOTTESMAN: Yes, Your Honor.

3 THE COURT: All right. Anything else on the
4 calendar for today?

5 MR. SNYDER: No, Your Honor.

6 THE COURT: All right. All right. Thank you all
7 for coming in. We're in recess.

8 (Whereupon these proceedings were concluded at
9 11:46 AM)

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I N D E X

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

**Sonya Ledanski
Hyde**

Digitally signed by Sonya Ledanski Hyde
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